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**Introduced by Senator Corbett**

February 14, 2013

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An act to amend Section 12940 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 292, as introduced, Corbett. Employment: sexual harassment.

Existing law, the California Fair Employment and Housing Act, protects and safeguards the right and opportunity of all persons to seek, obtain, and hold employment without discrimination, abridgment, or harassment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation.

This bill would expand the definition of harassment because of sex under these provisions to include threats of sexual violence and specify that an act is sexual harassment regardless of the sexual orientation, sexual desire, or intent of the harasser.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 12940 of the Government Code is
- 2 amended to read:
- 3 12940. It is an unlawful employment practice, unless based
- 4 upon a bona fide occupational qualification, or, except where based
- 5 upon applicable security regulations established by the United
- 6 States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

1 (B) Prohibit bona fide health plans from providing additional  
2 or greater benefits to employees with dependents than to those  
3 employees without or with fewer dependents.

4 (4) Nothing in this part relating to discrimination on account of  
5 sex shall affect the right of an employer to use veteran status as a  
6 factor in employee selection or to give special consideration to  
7 Vietnam-era veterans.

8 (5) (A) This part does not prohibit an employer from refusing  
9 to employ an individual because of his or her age if the law  
10 compels or provides for that refusal. Promotions within the existing  
11 staff, hiring or promotion on the basis of experience and training,  
12 rehiring on the basis of seniority and prior service with the  
13 employer, or hiring under an established recruiting program from  
14 high schools, colleges, universities, or trade schools do not, in and  
15 of themselves, constitute unlawful employment practices.

16 (B) The provisions of this part relating to discrimination on the  
17 basis of age do not prohibit an employer from providing health  
18 benefits or health care reimbursement plans to retired persons that  
19 are altered, reduced, or eliminated when the person becomes  
20 eligible for Medicare health benefits. This subparagraph applies  
21 to all retiree health benefit plans and contractual provisions or  
22 practices concerning retiree health benefits and health care  
23 reimbursement plans in effect on or after January 1, 2011.

24 (b) For a labor organization, because of the race, religious creed,  
25 color, national origin, ancestry, physical disability, mental  
26 disability, medical condition, genetic information, marital status,  
27 sex, gender, gender identity, gender expression, age, or sexual  
28 orientation of any person, to exclude, expel, or restrict from its  
29 membership the person, or to provide only second-class or  
30 segregated membership or to discriminate against any person  
31 because of the race, religious creed, color, national origin, ancestry,  
32 physical disability, mental disability, medical condition, genetic  
33 information, marital status, sex, gender, gender identity, gender  
34 expression, age, or sexual orientation of the person in the election  
35 of officers of the labor organization or in the selection of the labor  
36 organization's staff or to discriminate in any way against any of  
37 its members or against any employer or against any person  
38 employed by an employer.

39 (c) For any person to discriminate against any person in the  
40 selection or training of that person in any apprenticeship training

1 program or any other training program leading to employment  
2 because of the race, religious creed, color, national origin, ancestry,  
3 physical disability, mental disability, medical condition, genetic  
4 information, marital status, sex, gender, gender identity, gender  
5 expression, age, or sexual orientation of the person discriminated  
6 against.

7 (d) For any employer or employment agency to print or circulate  
8 or cause to be printed or circulated any publication, or to make  
9 any nonjob-related inquiry of an employee or applicant, either  
10 verbal or through use of an application form, that expresses,  
11 directly or indirectly, any limitation, specification, or discrimination  
12 as to race, religious creed, color, national origin, ancestry, physical  
13 disability, mental disability, medical condition, genetic information,  
14 marital status, sex, gender, gender identity, gender expression,  
15 age, or sexual orientation, or any intent to make any such limitation,  
16 specification, or discrimination. This part does not prohibit an  
17 employer or employment agency from inquiring into the age of  
18 an applicant, or from specifying age limitations, where the law  
19 compels or provides for that action.

20 (e) (1) Except as provided in paragraph (2) or (3), for any  
21 employer or employment agency to require any medical or  
22 psychological examination of an applicant, to make any medical  
23 or psychological inquiry of an applicant, to make any inquiry  
24 whether an applicant has a mental disability or physical disability  
25 or medical condition, or to make any inquiry regarding the nature  
26 or severity of a physical disability, mental disability, or medical  
27 condition.

28 (2) Notwithstanding paragraph (1), an employer or employment  
29 agency may inquire into the ability of an applicant to perform  
30 job-related functions and may respond to an applicant's request  
31 for reasonable accommodation.

32 (3) Notwithstanding paragraph (1), an employer or employment  
33 agency may require a medical or psychological examination or  
34 make a medical or psychological inquiry of a job applicant after  
35 an employment offer has been made but prior to the  
36 commencement of employment duties, provided that the  
37 examination or inquiry is job related and consistent with business  
38 necessity and that all entering employees in the same job  
39 classification are subject to the same examination or inquiry.

1 (f) (1) Except as provided in paragraph (2), for any employer  
2 or employment agency to require any medical or psychological  
3 examination of an employee, to make any medical or psychological  
4 inquiry of an employee, to make any inquiry whether an employee  
5 has a mental disability, physical disability, or medical condition,  
6 or to make any inquiry regarding the nature or severity of a physical  
7 disability, mental disability, or medical condition.

8 (2) Notwithstanding paragraph (1), an employer or employment  
9 agency may require any examinations or inquiries that it can show  
10 to be job related and consistent with business necessity. An  
11 employer or employment agency may conduct voluntary medical  
12 examinations, including voluntary medical histories, which are  
13 part of an employee health program available to employees at that  
14 worksite.

15 (g) For any employer, labor organization, or employment agency  
16 to harass, discharge, expel, or otherwise discriminate against any  
17 person because the person has made a report pursuant to Section  
18 11161.8 of the Penal Code that prohibits retaliation against hospital  
19 employees who report suspected patient abuse by health facilities  
20 or community care facilities.

21 (h) For any employer, labor organization, employment agency,  
22 or person to discharge, expel, or otherwise discriminate against  
23 any person because the person has opposed any practices forbidden  
24 under this part or because the person has filed a complaint, testified,  
25 or assisted in any proceeding under this part.

26 (i) For any person to aid, abet, incite, compel, or coerce the  
27 doing of any of the acts forbidden under this part, or to attempt to  
28 do so.

29 (j) (1) For an employer, labor organization, employment agency,  
30 apprenticeship training program or any training program leading  
31 to employment, or any other person, because of race, religious  
32 creed, color, national origin, ancestry, physical disability, mental  
33 disability, medical condition, genetic information, marital status,  
34 sex, gender, gender identity, gender expression, age, or sexual  
35 orientation, to harass an employee, an applicant, or a person  
36 providing services pursuant to a contract. Harassment of an  
37 employee, an applicant, or a person providing services pursuant  
38 to a contract by an employee, other than an agent or supervisor,  
39 shall be unlawful if the entity, or its agents or supervisors, knows  
40 or should have known of this conduct and fails to take immediate

1 and appropriate corrective action. An employer may also be  
2 responsible for the acts of nonemployees, with respect to sexual  
3 harassment of employees, applicants, or persons providing services  
4 pursuant to a contract in the workplace, where the employer, or  
5 its agents or supervisors, knows or should have known of the  
6 conduct and fails to take immediate and appropriate corrective  
7 action. In reviewing cases involving the acts of nonemployees, the  
8 extent of the employer's control and any other legal responsibility  
9 that the employer may have with respect to the conduct of those  
10 nonemployees shall be considered. An entity shall take all  
11 reasonable steps to prevent harassment from occurring. Loss of  
12 tangible job benefits shall not be necessary in order to establish  
13 harassment.

14 (2) The provisions of this subdivision are declaratory of existing  
15 law, except for the new duties imposed on employers with regard  
16 to harassment.

17 (3) An employee of an entity subject to this subdivision is  
18 personally liable for any harassment prohibited by this section that  
19 is perpetrated by the employee, regardless of whether the employer  
20 or covered entity knows or should have known of the conduct and  
21 fails to take immediate and appropriate corrective action.

22 (4) (A) For purposes of this subdivision only, "employer" means  
23 any person regularly employing one or more persons or regularly  
24 receiving the services of one or more persons providing services  
25 pursuant to a contract, or any person acting as an agent of an  
26 employer, directly or indirectly, the state, or any political or civil  
27 subdivision of the state, and cities. The definition of "employer"  
28 in subdivision (d) of Section 12926 applies to all provisions of this  
29 section other than this subdivision.

30 (B) Notwithstanding subparagraph (A), for purposes of this  
31 subdivision, "employer" does not include a religious association  
32 or corporation not organized for private profit, except as provided  
33 in Section 12926.2.

34 (C) For purposes of this subdivision, "harassment" because of  
35 sex includes sexual harassment, gender harassment, *threats of*  
36 *sexual violence*, and harassment based on pregnancy, childbirth,  
37 or related medical conditions, *regardless of the sexual orientation,*  
38 *sexual desire, or intent of the harasser.*

1 (5) For purposes of this subdivision, “a person providing services  
2 pursuant to a contract” means a person who meets all of the  
3 following criteria:

4 (A) The person has the right to control the performance of the  
5 contract for services and discretion as to the manner of  
6 performance.

7 (B) The person is customarily engaged in an independently  
8 established business.

9 (C) The person has control over the time and place the work is  
10 performed, supplies the tools and instruments used in the work,  
11 and performs work that requires a particular skill not ordinarily  
12 used in the course of the employer’s work.

13 (k) For an employer, labor organization, employment agency,  
14 apprenticeship training program, or any training program leading  
15 to employment, to fail to take all reasonable steps necessary to  
16 prevent discrimination and harassment from occurring.

17 (l) (1) For an employer or other entity covered by this part to  
18 refuse to hire or employ a person or to refuse to select a person  
19 for a training program leading to employment or to bar or to  
20 discharge a person from employment or from a training program  
21 leading to employment, or to discriminate against a person in  
22 compensation or in terms, conditions, or privileges of employment  
23 because of a conflict between the person’s religious belief or  
24 observance and any employment requirement, unless the employer  
25 or other entity covered by this part demonstrates that it has explored  
26 any available reasonable alternative means of accommodating the  
27 religious belief or observance, including the possibilities of  
28 excusing the person from those duties that conflict with his or her  
29 religious belief or observance or permitting those duties to be  
30 performed at another time or by another person, but is unable to  
31 reasonably accommodate the religious belief or observance without  
32 undue hardship, as defined in subdivision (t) of Section 12926, on  
33 the conduct of the business of the employer or other entity covered  
34 by this part. Religious belief or observance, as used in this section,  
35 includes, but is not limited to, observance of a Sabbath or other  
36 religious holy day or days, reasonable time necessary for travel  
37 prior and subsequent to a religious observance, and religious dress  
38 practice and religious grooming practice as described in subdivision  
39 (p) of Section 12926.

1 (2) An accommodation of an individual's religious dress practice  
2 or religious grooming practice is not reasonable if the  
3 accommodation requires segregation of the individual from other  
4 employees or the public.

5 (3) An accommodation is not required under this subdivision  
6 if it would result in a violation of this part or any other law  
7 prohibiting discrimination or protecting civil rights, including  
8 subdivision (b) of Section 51 of the Civil Code and Section 11135  
9 of this code.

10 (m) For an employer or other entity covered by this part to fail  
11 to make reasonable accommodation for the known physical or  
12 mental disability of an applicant or employee. Nothing in this  
13 subdivision or in paragraph (1) or (2) of subdivision (a) shall be  
14 construed to require an accommodation that is demonstrated by  
15 the employer or other covered entity to produce undue hardship,  
16 as defined in subdivision (t) of Section 12926, to its operation.

17 (n) For an employer or other entity covered by this part to fail  
18 to engage in a timely, good faith, interactive process with the  
19 employee or applicant to determine effective reasonable  
20 accommodations, if any, in response to a request for reasonable  
21 accommodation by an employee or applicant with a known physical  
22 or mental disability or known medical condition.

23 (o) For an employer or other entity covered by this part, to  
24 subject, directly or indirectly, any employee, applicant, or other  
25 person to a test for the presence of a genetic characteristic.